MBF INSURANS BHD

v.

SYARIKAT LETRIK HEAP SENG

HIGH COURT MALAYA, IPOH
JAMES FOONG J
[ORIGINATING MOTION NO: 25-22-2001]
20 MARCH 2002

CIVIL PROCEDURE: *Stay of execution - Application to vacate order - Application made by way of originating motion - Whether proper procedure - Whether only way to set aside stay is by way of appeal - Rules of the High Court 1980, O. 59 r. 12*

The sessions court had earlier allowed the plaintiff's claim against the respondent; however, upon a subsequent application by the respondent, an order for stay of execution pending appeal to the High Court was granted. The plaintiff then applied by way of an originating motion in the High Court to set aside the sessions court's order for stay of execution.

Held:

[1] Once an order for stay is allowed by the court below, the High Court would no longer entertain an application for stay. Order 59 r. 12 of the Rules of the High Court 1980 only empowers the High Court to grant a stay not to reverse any such order once allowed. This provision does not provide an avenue to review the decision handed down by the court below; it only permits the High Court to entertain an application for stay if none is in existence. Thus, where the court below decrees an order, and there is no special procedure prescribed to deal with it otherwise, then the only route to seek a reversal of that order is by way of an appeal. (p 362 e-f)

[Application dismissed.]

Case(s) referred to:
J Lucas (Batteries Ltd & Anor) v. Gaedor Ltd & Ors [1978] RPC 389 ***(foll)***
Shanmugam Pillai v. Panjali [1961] 27 MLJ 290 ***(refd)***
Taman Penawar Sdn Bhd v. Khoo Guat Ngor & Ors [1995] 2 CLJ 443 ***(not foll)***
VGM Holdings Ltd [1941] 3 All ER 417 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 59 r. 12

For the plaintiff - Karnail Singh; M/s KS Sidhu & Co
For the defendant - A Iruthaya Raj; M/s Raj Selva & Co

Reported by Suresh Nathan

JUDGMENT

James Foong J:

Introduction

The applicant in this proceeding was the plaintiff in a civil action (the action) filed in the Sessions Court at Ipoh bearing number 52-2124-98. In the court below, the applicant, as plaintiff, was claiming from the respondent, who was the defendant in the action, a sum of RM92,922.10 with interest and cost arising from a burglary insurance claim which the respondent refused to pay out to the applicant. After a full hearing, the Sessions Court judge allowed the applicant's claim with interest and cost. But upon a subsequent application by the respondent's counsel to the same court, an order for stay of execution pending appeal to the High Court was granted.

Both parties were dissatisfied with the outcome at the lower court. The respondent filed an appeal to the High Court against the decision, and the applicant commenced an application by way of an originating motion in the High Court to set aside the order for stay of execution. This application is now before me for consideration.

Preliminary Objection

At the outset of the hearing Mr. Raj, counsel for the respondent, raised a preliminary objection to this motion insisting that it is wrong in procedure and law. He submitted that if the applicant is unhappy with the decision of the Sessions Court to stay execution the applicant should file an appeal against that decision; not by way of an attempt to set aside the order for stay in the High Court.

Mr. K.S Sidhu, counsel for the applicant, disagreed with this contention and tendered to me the current High Court authority of *Taman Penawar Sdn Bhd v. Khoo Guat Ngor & Ors* [1995] 2 CLJ 443 which supports the correctness of the approach adopted by the applicant.

Refusing to concede, Mr. Raj returned with English authorities to convince me that *Taman Penawar Sdn Bhd* was decided without having the opportunity to consider these persuasive authorities.

Analysis

After careful consideration of the law and cases cited, I am of the view that the provision governing the process of an application to the High Court for a stay of execution pending an appeal to the High Court is O. 59 r. 12 of the Rules of High Court (RHC). It provides:

> An appeal shall not operate as a stay of execution under the decision appeal against except in so far as the Court appealed from or the High Court may order, and any application for stay shall be made in the first instance to the Court appealed from.

From decided authorities, principally *Shanmugam Pillai v. Panjali* [1961] 27 MLJ 290, the court below from where the decision was appealed from and the High Court have co-ordinate jurisdiction to entertain application for stay of execution except that while the High Court is possessed of such jurisdiction "it will not exercise its independent jurisdiction until an application has been made to the same effect and decided upon in the Court below." – per Ismail Khan J (as he then was).

In *Shanmugam Pillai* the appellant was ordered by the Sessions Court to give up vacant possession of certain portion of a premises to the respondent. An application was subsequently made by the appellant in the Sessions Court to stay execution of this judgment. It was refused. Thereupon the appellant appealed to the judge of the High Court against this decision. Before the appeal could be argued, the respondent's counsel, raised the preliminary objection that such an appeal is not warranted by any rules of the procedure. The learned judge agrees with him, and after pointing out the independent jurisdiction of the High Court to grant stay of execution besides that possessed by the court below, stressed:

> Therefore, where a special procedure is prescribed, as in this case, by an application to the High Court to grant a stay of execution of a judgment in the Court below, pending appeal, I am not prepared to say that an entirely different step taken to achieve that objective, as it has been done in this case by appealing against the refusal for stay of execution by the Court below, is a curable irregularity. I have no power to convert an appeal into an application.

But one must bear in mind that the appeal mounted by the appellant in *Shanmugam Pillai* was against the refusal of the court below to grant stay execution whilst in our present situation, as well as that in *Taman Penawar Sdn Bhd*, stay was allowed followed by an application to the High Court by the dissatisfied party to set aside such order. Justice Vincent Ng strongest justification in *Taman Penawar Sdn Bhd* to entertain such process instead of an appeal is, in my humble opinion, set out in his 5th ground of reason at p. 446 of the judgment where he declares:

> As it is trite law that a party who is refused stay in the lower court may yet move the High Court by originating motion for a stay, it would thus be unjust not to allow the aggrieved party who had been prevented by such a stay from claiming the fruits of his litigation to move the High Court by means of a similar procedure. It is axiomatic that courts have to be even handed when considering such matters of procedure *vis-a vis* the successful as well as the unsuccessful party in the suit or action. It ought to be noted that a litigant's right to the fruits of his litigation is as valid and imperative as the opponent's right to the maintenance of *status quo* pending appeal; a *fortiori*, when the court of first instance has held in the former's favour after having heard the evidence.

With the greatest of respect, though this may post a strong moral argument to allow an aggrieved party where stay was granted by the court below to apply to the High Court to set aside an order for stay by way of an originating motion instead of an appeal but this is not warranted by any rules of procedure. Order 59 r. 12 of the RHC only arms the High Court with an independent jurisdiction to entertain an application for stay and, even this, will only be exercised after the court below has made a decision on a similar application. This is revealed from the circumstances in *Shanmugam Pillai* where the High Court directed the appellant to make an application under O. 59 r. 12 RHC for stay. But once an order for stay is allowed by the court below then the High Court, in my view, is no longer entertaining an application for stay, for stay has already been granted. Order 59 r. 12 RHC, as expressed, only empowers the High Court to grant a stay not to reverse any such order once allowed. This provision of the RHC does not provide an avenue to review the decision handed down by the court below. It only permits the High Court to entertain an application for stay if none is in existence. Thus where the court below decrees an order, and there is no special procedure prescribed to deal with it otherwise, then the only route to seek a reversal of that order is by way of an appeal.

This approach is adopted by the English Court of Appeal in *J. Lucas (Batteries Ltd & Anor) v. Gaedor Ltd. & Ors* [1978] RPC 389, which may not have been cited to the learned judge in *Taman Penawar Sdn Bhd.* In this case the High Court has granted a stay for taking of accounts as to profits for infringing a patent in a intellectual property action. The aggrieved party of this order gave notice of an application before the Court of Appeal to set aside this stay. The opposing counsel adopted a similar preliminary objection to the one raised in our case. The ruling by the court is:

> A preliminary question arose as to the form of the proceedings. Mr. Aldons, on behalf of the plaintiffs contended, that the appropriate procedure to obtain the removal of a stay must be similar to that for obtaining a stay in this court, and that under RSC O. 59 r. 13(1) the proper course for obtaining a stay was by original motion and not by way of appeal. I express no opinion as to whether that proposition is correct in relation to seeking a stay, but I entertain no doubt that **where a stay has been granted the only way of getting rid of it is by appeal.** (emphasis added)

The strict adherence to this approach (appeal rather then by way of an attempt to reverse a decision where stay has been granted) also found favour in the case of *V.G.M. Holdings, Ltd.* [1941] 3 All ER 417. There the respondent applied to vary a stay order granted by another judge. Justice Morton in refusing declares:

> I think that, when a judge has made an order such as that in the present case, the only remedy for the respondent, if he is dissatisfied with the order, is to go to the Court of Appeal ...

Conclusion

Holding the above views, I must conclude that this application of the plaintiff is wrong in law and has to be dismissed with cost. But this does not prevent the plaintiff from filing an appeal against the decision of the court below in granting stay provided, of course, the plaintiff is within the prescribed time for filing such appeal.